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June 15, 2009

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

RE: May 12, 2009 Petition of Level 3 for a Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS-Originated Toll-Free Calls; WC Docket No. 01-92; CC Docket No. 96-262

Dear Ms. Dortch:

Comtel Telcom Assets LP, d/b/a Excel Telecommunications ("Excel") respectfully submits this letter regarding the Petition for Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS-Originated Toll-Free Calls filed by Level 3 on May 12, 2009 with the Federal Communications Commission ("FCC") in WC Dockets 01-92 and 96-262 ("Level 3 Petition").

Summary

In its Initial Reply Comments[1] filed on June 1, 2009, Excel noted that it agreed with the basic points made by Level 3. Excel also explained that there were additional pertinent related issues not raised by Level 3 pending in the litigation between Excel and Hypercube pending before the U.S. District Court for the Northern District of Texas, *Hypercube Telecom, LLC v. Comtel Telcom Assets LP, d/b/a Excel Telecommunications*, Case No. 3:08-CV-2298-B) (the "Texas Court" and the "Texas Litigation").

The most important additional issue is whether the FCC has done anything to legally compel IXCs to purchase Hypercube's "service." As described below, the FCC has wisely

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[1] On June 1, 2009, a few days after it learned of Level 3's Petition, Excel timely filed brief Initial Reply Comments and a Motion for Extension of Time to File Final Reply Comments requesting that the due date for filing of Reply Comments be extended through June 15, 2009. Excel submits this letter as Reply Comments if the Motion is granted and as a Written Ex Parte Presentation if the Motion is denied.

limited any obligation of IXCs to purchase CLEC access service with prudent conditions that Hypercube's unlawful call routing scheme does not meet.

The FCC should either formally enlarge these proceedings to consider this additional issue or specify that it is beyond the scope of this proceeding as it is not raised in Level 3's Petition. Certainly, in resolving Level 3's Petition, the FCC should not do anything to inadvertently encourage Hypercube's scheme or other CLEC insertion schemes by assuming that IXCs have some obligation to purchase Hypercube's unlawful "service," when they do not.

Background

Excel is a victim of the same access charge scheme that Hypercube Telecom, LLC and its affiliates (collectively, "Hypercube"), and apparently other inserting CLECS, have perpetrated. Hypercube's traffic pumping arrangement with CMRS providers is fast becoming a growing problem in the telecommunications industry. At least two other IXCs have fallen victim to the scheme: Level 3, which filed the Petition, and Deltacom, which filed a letter in this docket on June 6, 2009. As Level 3 explains:

> a. Hypercube has inserted itself in between the originating wireless carriers and the incumbent local exchange carrier ("ILECs") in the calling path of 1-8XX calls dialed by the subscribers of wireless carriers. Prior to Hypercube's insertion into the calling path, the wireless carriers routed 1-8XX calls dialed by their customers to ILECs, who then routed them to the IXC. [2] Accordingly, Excel received one set of invoices from the ILECs for their services in handling a portion of the calling path. See the "before Hypercube" diagram attached to this letter as Exhibit A. Now that there is an extra step in the calling path, because the calls go through both Hypercube and the ILECs, rather than just through the ILECs, Excel receives two sets of invoices, one from Hypercube, and one from the ILECs. See the "with Hypercube" portion of Exhibit A. As is evident from this routing, Hypercube's "services" are duplicative and unnecessary and provide no benefit that would justify Hypercube imposing any charges.
>
> b. Hypercube had admitted that it shares a portion of the "access" revenues it generates with the wireless carriers whom Hypercube has induced to send it this traffic. *See* Level 3 Petition at 6, n.5 (quoting Hypercube pleading admitting revenue sharing). The revenue sharing results in the wireless carriers indirectly imposing access charges on IXCs, and so violates the FCC's orders prohibiting wireless carriers from imposing access charges on IXCs without the IXC's consent.[3]
>
> c. Hypercube's rates also vastly exceed ILEC rates, and thus violate the FCC's rule prohibiting CLECs from imposing access rates exceeding ILEC rates. 47

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[2] Hypercube purports to be a competitive local exchange carrier ("CLEC"). Excel is, among other things, an interexchange carrier ("IXC"). Excel provides services that allow its customers to receive 1-8XX calls dialed on a toll-free basis.

[3] *See Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC. Rcd. 13192, ¶¶ 8-9, 12 (2002); *see also Eighth Report and Order and Fifth* Order *on Reconsideration, in the Matter of Access Charges Reform*, 19 FCC.Rcd. 9108, ¶ 16 (2004).

C.F.R. 61.26(b). Level 3 provides a specific comparison of Hypercube rates and ILEC rates at pages 8-9 of its Petition. Excel has performed its own comparison of Level 3 rates to ILEC rates, and agrees with Level 3's conclusions. For example, Excel has found that the average aggregate interstate Hypercube rate is $.002766 per minute and the average interstate ILEC rate is $0.001778 per minute.

The FCC Has Not Ordered IXCs to Purchase Hypercube's "Service"

Level 3's counsel has explained to Excel's undersigned counsel that Level 3 does not believe it is obligated to purchase Hypercube's "service." However, Level 3 does not directly raise that issue in its Petition.

Although Hypercube incorrectly maintains otherwise, IXCs are not required to purchase Hypercube's service because (a) Hypercube charges rates exceeding ILEC rates and (b) Hypercube as an "inserted CLEC" does not serve the end user placing or receiving the call, with whom Hypercube has no business relationship whatsoever. 47 U.S.C. § 201(a) governs whether and when IXCs must purchase the service of other carriers, including CLECs, so that calls may be completed over facilities not owned by the IXC:

> It shall be the duty of every common carrier ... in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the division of such charges, and to establish and provide facilities and regulations for operating such through routes.

47 U.S.C. § 201(a) (emphasis added). In *AT&T v. FCC,* the D.C. Circuit construed Section 201(a) and concluded that an IXC must purchase service from CLECs so that calls may be completed only if the FCC has, after a hearing, entered a "through route" order requiring such purchase. *AT&T v. FCC*, 292 F.3d 808, 812 (D.C. Cir. 2002). The Court found AT&T had no obligation to purchase CLEC access service because the FCC had never issued such a "through route" order to IXCs. *Id.*

In its *Seventh and Eighth Reports and Orders* in the CLEC Access Charge proceeding (CC Docket No. 96-262), the FCC imposed a ***limited and conditional*** Section 201(a) "through route" obligation on IXCs to purchase certain CLEC access service. In the *Seventh Report and Order,* the FCC ordered IXCs to purchase CLEC access service if several ***conditions*** are met, including that: (1) the CLEC's rates are less than or equal to a "safe harbor" that the FCC set to equal ILEC rates, and (2) the end user placing or receiving the call is the customer of the CLEC billing for access:

> We therefore conclude that an IXC that refuses to provide service to an end user of a CLEC charging rates within the safe harbor, while serving the customers of other LECs within the same geographic area, would violate section 201(a).
> ...
> We also make clear that an IXC's refusal to serve the customers of a CLEC that tariffs access rates within our safe harbor, when the IXC serves ILEC end users in

> the same area, generally constitutes a violation of the duty of all common carriers to provide service upon reasonable request

Seventh Report and Order, in the Matter of Access Charge Reform, 16 FCC.Rcd. 9923, ¶¶ 5, 94 (2001) (*"7th Report and Order"*) (emphasis added). The FCC also indicated that any obligation to purchase was premised upon the CLEC having filed an access tariff with the FCC, which is a third condition on the obligation to purchase. *Id.*, ¶ 5 (for an obligation to purchase to apply, the CLEC must, among other things, "tariff[] access rates within our safe harbor").

Then, in the *Eighth Report and Order*, the FCC restated these conditions on the obligation to purchase and clarified that this conditional obligation to purchase was a "through route" order entered in response to the D.C. Circuit's decision in *AT&T v FCC*:

> The Commission also concluded [in the *Seventh Report and Order*] that an IXC would violate section 201(a) of the Act by refusing to complete a call to, or accept a call from, an end user served by a competitive LEC charging rates at or below the benchmark. ...
>
> An IXC that refuses to provide service to an end user of a CLEC charging rates within the safe harbor, while serving the customers of other LECs within the same geographic area, would violate § 201(a).

Eighth Report and Order, in the Matter of CLEC Access Charges, 19 FCC.Rcd. 9108, ¶¶ 4, 59, 60 (2004) (*"8th Report and Order"*) (emphasis added); *see also, id.* at ¶ 51 (noting that obligation to purchase applies to "tariffed" access service). Thus, in response to the decision in *AT&T v. FCC*, the FCC determined to order IXCs to purchase CLEC access service in some circumstances but not all circumstances.[4]

Neither of the first two conditions discussed above on the limited obligation of IXCs to purchase CLEC access service are met here, so IXCs have no obligation to purchase Hypercube's service. The condition that the end user placing or receiving the call be the customer of the CLEC is not met because the wireless carriers, and not Hypercube, serve the originating end user. *7th Report and Order*, ¶¶ 5, 94; *8th Report and Order*, ¶¶ 4, 59. Hypercube's scheme, like other CLEC insertion schemes, is based on the insertion into the call path of an intermediary carrier (Hypercube) with no relationship with the end user placing or receiving the call. Intermediary CLECs are only in the calling path because some other carrier chose to route calls to them. When the CLEC is not serving the end user customer, the CLEC is not an essential player who must be involved in the call path, and so there is no reason to impose

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[4] In the *8th Report and Order,* the FCC also capped rates of intermediary CLEC services at ILEC rates, with the result that IXCs who choose to purchase the intermediary CLEC services have some protection against price gouging. "Specifically, we find that the rate a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rates charged by the competing incumbent LEC for the same functions." *8th Report and Order,* ¶ 17. Perhaps anticipating Hypercube's CLEC insertion scheme, the FCC wisely did nothing to order IXCs to purchase service from intermediary CLECs not serving the end user.

an obligation to purchase on IXCs.[5] The condition that the CLEC's rates not exceed ILEC rates is also not met because, as discussed above, Hypercube's rates exceed ILEC rates, and so are not within the safe harbor. *7th Report and Order*, ¶¶ 5, 92, 94 ("Certainly we have made no finding that the public interest dictates such broad acceptance [by IXCs] of access service, whatever its price."); *8th Report and Order*, ¶¶ 4, 59.

Additionally, until at least March 31, 2009, Hypercube had no access tariff on file at the FCC.[6] Thus the third condition on the limited obligation to purchase was not satisfied until, at best, very recently, and the first two conditions have never been satisfied.

Because Excel is not and was not obligated to purchase Hypercube's service, it has informed Hypercube on multiple occasions that it declines to purchase Hypercube's service. Nevertheless, Hypercube continues to route calls indirectly onto Excel's network through ILECs, just as Hypercube apparently continues to indirectly route calls onto Level 3's network. As Level 3 explains, this is a Hypercube practice that Level 3 and other IXCs (like Excel) have no engineering means to stop because Hypercube routes the calls through ILECs so that they arrive at IXCs' networks intermingled with many other types of calls not involving Hypercube. Level 3 Petition at 6. IXCs have no way to identify and segregate the calls involving Hypercube. *Id.*

The FCC, a court or another tribunal with jurisdiction can efficiently resolve this impasse without causing disruption of the telephone network by applying Section 201(a), *AT&T v. FCC*, and the *7th and 8th Reports and Orders* and declaring that IXCs have no obligation to purchase Hypercube's service. That would deprive Hypercube of the incentive to provide kickbacks to the wireless carriers to route calls to it, leaving the wireless carriers with every incentive to resume their prior efficient practice of routing these calls through non-Hypercube parties to IXCs. This would end the unnecessary duplicative routing produced by Hypercube's kickbacks.

Although IXCs lack the technical means to block calls that Hypercube indirectly routes to them though ILECs, the FCC or a court should as a precaution protect consumers by specifically declaring that IXCs need not attempt to block calls to avoid purchasing service from a CLEC from whom it has no obligation to purchase service. *See* Level 3 Petition at 7 (explaining that Hypercube takes the incorrect position that IXCs must block calls in order to avoid buying

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[5] See *7th Report and Order*, ¶ 24 (if IXCs refuse to accept access service from the originating CLEC serving the end user placing the call, "it will become impossible for that CLEC's end users to reach, or receive calls from, some parties outside of the local calling area.")

[6] Attached as Exhibit B is a Certificate from the Secretary of the FCC that Hypercube did not have a tariff on file at the FCC as of January, 2009 under either its present name (Hypercube Telecom, LLC) or its former name (KMC Data, LLC). *See also* Level 3 Petition at 7 (stating Level 3 could not locate a Hypercube federal tariff). Several months after Excel pointed this out to the Texas Court, the "KMC Telecom Operating Companies" filed a tariff amendment on or about March 27, 2009 which purportedly changed the list of "issuing carriers" stated on Sheet 2 of that tariff to include "KMC DATA, LLC, N/K/A HYPERCUBE TELECOM, LLC" effective March 31, 2009. Hypercube claims it can rely on the pre-amendment tariff that include names of other companies with which it may formerly have been affiliated, but Hypercube does not satisfactorily explain how that argument complies with 47 U.S.C § 203(c) and 47 CFR 61.22(a), which require that each carrier issuing a tariff have their own name on that tariff. The lack of a Hypercube tariff until so recently is an issue in the Texas litigation. Excel does not concede the lawfulness of the March 31, 2009 tariff amendment and reserves all rights with respect to it.

Hypercube's service). If some technology develops in the future making it possible for IXCs to identify, seggregate, and block these calls, it would be against public policy to require IXCs to block consumer's calls in order to avoid purchasing unwanted excessively-priced or unecessary CLEC services that the IXC has no obligation to purchase because the CLEC does not comply with the conditions on the limited obligation to purchase that the FCC imposed on IXCs in the *7th and 8th Reports and Orders*. It is the CLEC that insists on providing unwanted "service" in those circumstances, not the consumer or the IXC, that should bear the consequences of the CLEC's decision to insert itself in the calling path.

Excel submits this letter to alert the FCC to the additional issue of whether there is an obligation to purchase, an issue which is implicated by but not raised by Level 3's petition. The FCC should either leave this issue for initial resolution by other authorities, in which case no action is necessary although a specific statement that the issue is not being resolved by the FCC would be helpful, or give notice that is taking the issue up for consideration as part of this proceeding.

Conclusion

In these economic times, it can be difficult to persuade customers to voluntarily purchase telecommunications services. This has created a temptation for carriers to dream up traffic pumping schemes and bill "customers" for unnecessary, duplicative, and excessively-priced "services" that the supposed "customers" do not want, do not request, are not required to purchase, and specifically decline to purchase. Hypercube and certain wireless carriers have fallen to this temptation.

In the end, end users of the CMRS carriers receive the same quality of service, whether these calls are delivered through the ILECs directly or are first passed through inserting CLECs unnecessarily. The only thing achieved by permitting inserting CLECs to inject themselves into this process is to line the pockets of the inserting CLECs and increase the rates charged to primarily small business customers who purchase toll free services from the IXCs.

The FCC should grant Level 3's Petition and put an end to Hypercube's scam. Additionally, recognizing that other authorities are considering these issues, the FCC should either enlarge the issues presented by Level 3 to include the issue of whether IXCs are required to purchase Hypercube's service or note that the issue is beyond the scope of Level 3's Petition.

Sincerely,

James Lister

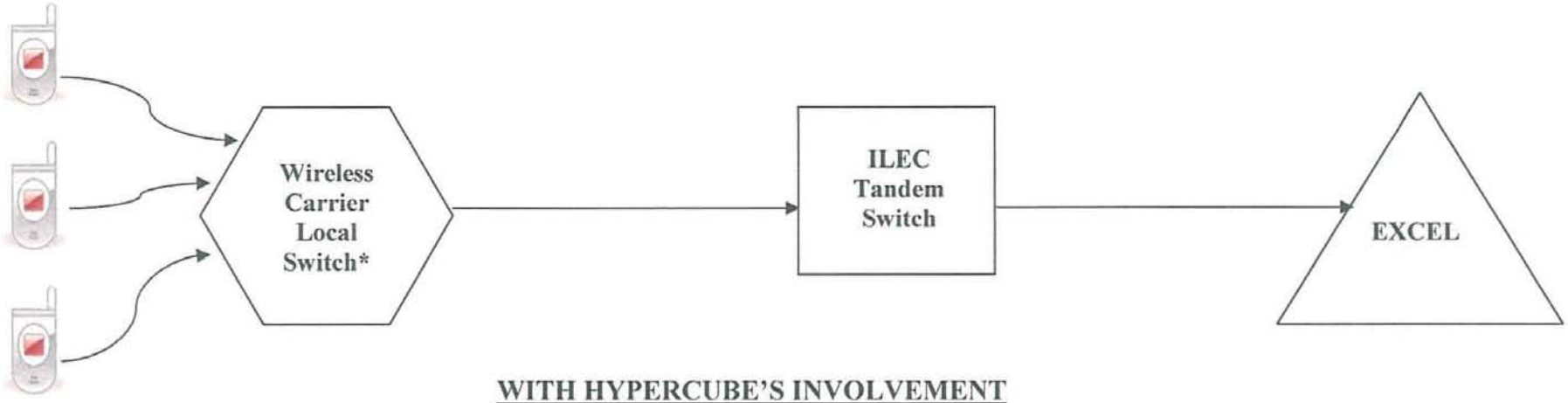
James H. Lister
Counsel for Comtel Telcom Assets LP
d/b/a Excel Telecommunications

Cc: John T. Nakahata (Counsel for Level 3)
Anthony Mastando (Counsel for DeltaCom)
Michael Hazzard (Counsel for Hypercube)
Bob Arnett (Co-Counsel for Excel Telecommunications)

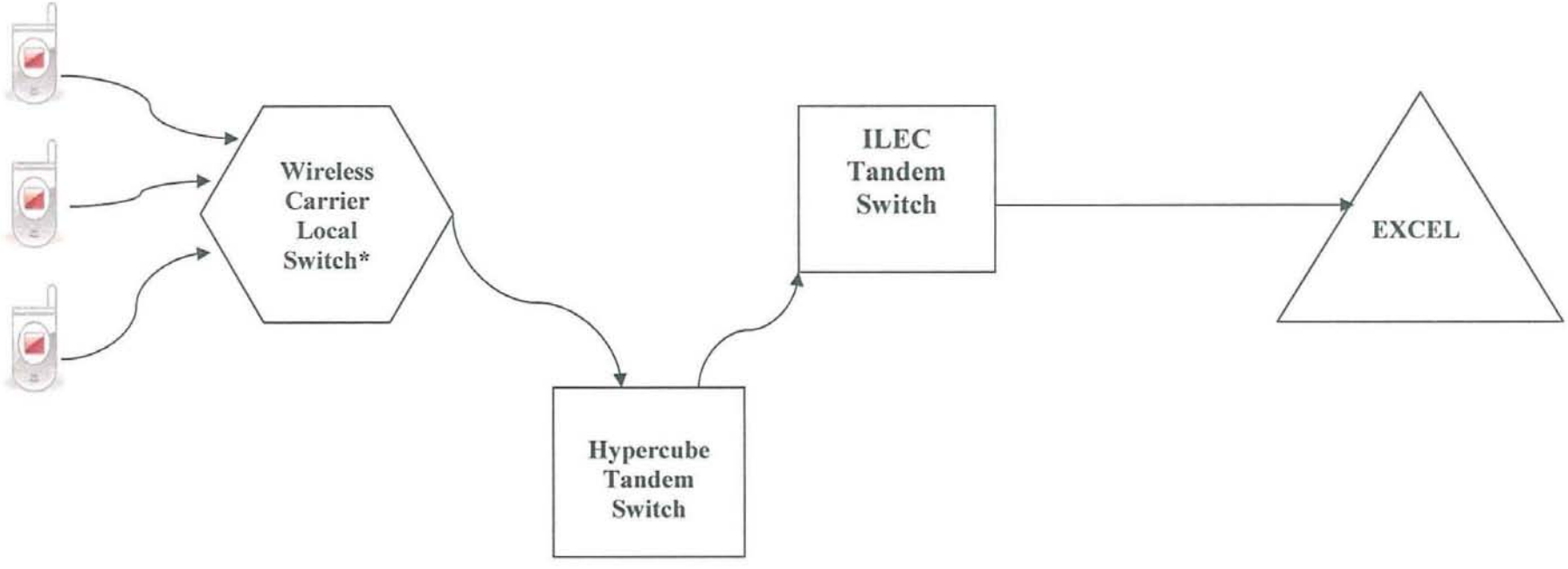
EXHIBIT A

CALL-ROUTING DIAGRAM

BEFORE HYPERCUBE'S INVOLVEMENT



WITH HYPERCUBE'S INVOLVEMENT



***It is unknown whether there are wireless tandem switches in between the wireless local switch serving the called party and the first non-wireless tandem switch. This diagram is based on Excel's current knowledge and may be updated as further information is obtained**

EXHIBIT B

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

Certification of Record

I, Marlene H. Dortch, state that I am the duly appointed and authorized Secretary of the Federal Communications Commission of United States of America and, as part of my duties; I have the care, custody and control of all official records pertaining to the business of the said Commission.

I further state, on information and belief, that after research of our tariff database, the search disclosed that as of January 9, 2009 no tariffs have been filed under the names Hypercube, LLC, Hypercube Telecom, LLC or KMC Data, LLC.

The results of the search are not based on my personal knowledge, but are based on the information examined by employees on behalf of the Commission, and I believe, therefore, that the result of the search is true and correct.

The Commission seal, affixed hereunder, shall be judicially recognized, 47 U.S.C. § 154(h).

IN WITNESS THEREOF, I have hereunto set my hand and caused the seal of the Federal Communications Commission to be affixed, this 15th day of January, 2009.

Marlene H. Dortch

Secretary